**83-169**

NO.



# In the Supreme Court of the United States

OCTOBER TERM, 1983

CARLOS MARCELLO

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTION PRESENTED

Whether 18 U.S.C. §1962(d), the conspiracy provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), may be so broadly applied to proscribe an agreement to associate for the purpose of committing multiple offenses?

The question arises under the circumstances of a federally initiated scheme to secure a state insurance contract. The defendants agreed to engage in an act of local bribery and allegedly agreed to mail a letter and make a long distance telephone call for that purpose. There was no proof of an enterprise apart from the conspiratorial combination to commit these offenses. The defendants were acquitted of all substantive charges.

## PARTIES

The parties to the proceeding in the court of appeals were the respondent United States, the petitioner Carlos Marcello, and Charles E. Roemer, II, a co-defendant.

Roemer has previously filed with the Court a petition for a writ of certiorari. (Docket No. 83-29). Marcello hereby adopts by reference the issues raised in the Roemer petition. We likewise adopt by reference the appendix to Roemer's petition with the exception of Appendix E, which is different for Marcello, and which we attach hereto.

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## TABLE OF AUTHORITIES



## OTHER AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

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Carlos Marcello petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction under 18 U.S.C. §1962(d) for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO).

## OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 703 F.2d 805 (5th Cir. 1983). There were two opinions by the district court, the first, involving pre-trial motions (App. B), is reported at 508 F.Supp. 586 (E.D. La. 1981), and the second, addressing post-trial motions (App. C), is reported at 537 F.Supp. 1364 (E.D. La. 1982).

## JURISDICTION

Pursuant to 28 U.S.C. §1254(1), Marcello invokes the jurisdiction of the Court to review the judgment of a court of appeals in a criminal case. The court of appeals entered its judgment (App. D) affirming Marcello's conviction and sentence on April 11, 1983. A petition for rehearing *en banc* was timely filed and denied by the court on May 31, 1983. (App. E). This petition for certiorari is timely filed within the sixty days allowed by Rule 20.1.

## STATUTORY AND CONSTITUTIONAL PROVISIONS

*Racketeer Influenced and Corrupt Organizations*, 18 U.S.C. §1961, et seq.:

> §1961. Definitions
>
> As used in this chapter—
>
> (1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs which is chargeable under state law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code:...section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)...section 1952 (relating to racketeering)....
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> (5) "pattern of racketeering activity" requires at

least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

* * *

§1962. Prohibited activities

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

*Amendment V, United States Constitution*:

...nor shall any person...be deprived of life, liberty, or property, without due process of law;....

## STATEMENT OF THE CASE

*Proceedings:*

Marcello and Roemer, together with three others, were defendants in a twelve count indictment that was the product of a year long undercover sting operation known as "Brilab."[1] Count I charged a RICO conspiracy, 18 U.S.C. §1962(d); Count II charged a substantive RICO violation,

[1] The acronym stands for "bribery-labor."

18 U.S.C. §1962(c); and Counts III through XII variously charged violations of wire fraud 18 U.S.C. §1343, mail fraud 18 U.S.C. §1341, and interstate travel 18 U.S.C. §1952.[2] After an eighteen week jury trial, Marcello and Roemer alone were convicted of the RICO conspiracy. Acquittals were granted by either the trial court or the jury on the remaining charges and as to the other defendants.[3] Marcello was sentenced to seven years imprisonment[4] and Roemer was sentenced to three years. Both are currently in custody serving their respective sentences.

*Facts:*

In the spring of 1979 the FBI instigated an undercover sting operation expressly designed "to criminally involve labor officials"[5] but which ultimately involved state officials. Two FBI agents and an informant posed as owners of Fidelity Financial Consultants, a fictitious creation of the FBI, and as representatives of the Prudential

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[2] Marcello was charged in all counts and Roemer was charged in Counts I, II, IX, X, XI, and XII.

[3] Pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure, the trial court acquitted one defendant of all charges, another defendant of one count, and Roemer of Counts IX and XI. The jury did the rest.

[4] Following his conviction, Marcello was tried and convicted in the Central District of California in another case that resulted from the so-called Brilab operation. *United States v. Marcello, et al.*, No. 81-720-RJK. Marcello was sentenced to an additional ten years in that case to be served consecutively to the sentence imposed below. That case is presently on appeal before the United States Court of Appeals for the Ninth Circuit, Number 82-1276. Oral argument is scheduled for August 19, 1983.

[5] An internal FBI memorandum dated March 22, 1979 from the Los Angeles field office to the FBI director requested permission to institute the sting operation "to criminally involve" certain named labor officials. 537 F.Supp. at 1373.

Insurance Company of America, one of the largest insurance companies in the world.[6] In those roles, the agents and the informant, Joseph Hauser,[7] expressed their willingness to share enormous insurance commissions, as much as a hundred thousand dollars a month, with anyone who would help them place insurance contracts.

Hauser, a twice-convicted swindler and admitted perjurer,[8] first met Marcello in 1976 when Hauser purchased a Louisiana insurance company. Hauser was introduced to Marcello by I. Irving Davidson, a Washington lobbyist, long-time friend of Marcello, and one of the defendants acquitted in the case. Marcello in turn introduced Hauser to a Louisiana banker who was a former owner of the insurance company. Hauser eventually purchased the com-

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[6] In advertising a connection with Prudential, the government violated the terms of an agreement it had reached with that company. *United States v. Marcello*, 537 F.Supp. at 1367, n. 3.

[7] Hauser, characterized by the trial court as a "career con man," 537 F.Supp. at 1367, was paid a salary of $75,300 by the government over a 19 month period. In his eagerness to serve, Hauser, whose conversations were electronically recorded, on three occasions simply manufactured conversations calculated to incriminate important individuals, among them the then Attorney General of the United States, a leading candidate for governor of Louisiana, and Marcello. 537 F.Supp. at 1371-1373.

[8] Hauser was convicted in March of 1977 in the United States District Court for the Central District of California, Number CR 76-1331-IH and received a thirty month term of imprisonment. He admittedly committed perjury in those proceedings. While that conviction was on appeal, Hauser was indicted in 1978 on federal racketeering charges in Phoenix, Arizona, Number CR 78-313, and agreed to become an undercover operative in the plea negotiations that concluded in February, 1979. As an additional reward for his cooperation in Brilab, Hauser was effectively able, through the government's intervention, to escape punishment on the ten count Phoenix indictment charging him with theft of $3.5 million.

pany with premiums[9] received from the $24 million insurance contract with the Central States, Southeast and Southwest Teamsters Health & Welfare Fund that Hauser obtained through the assistance of Richard Kleindienst, the former Attorney General of the United States.[10]

When Hauser began to work for the government in February of 1979, he was instructed to pursue Davidson with the sham undercover operation to gain his assistance in the acquisition of insurance business and to renew Hauser's acquaintance with Marcello. The government provided Hauser with tape recording equipment to record his conversations. Later, the government secured Title III intercept orders for the communications of Davidson and Marcello.

From the beginning, Hauser tempted Davidson into assisting him by playing upon Davidson's sympathy for Hauser's financial plight. The following are examples of the technique used by Hauser to prevail upon Davidson to assist him in acquiring insurance business.

> "Oh God, the problem is, is a very simple one, is that my financial position is beyond belief. It is so beyond belief that uh, I just can't describe it to you. Ah, there are crises and there are crises, but this, is the super, super crisis." (D. Ex. 6).

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[9] A subcommittee of the United States Senate in a report entitled "Labor Union Insurance Activites of Joseph Hauser and his Associates," concluded that of the $39 million in insurance premiums obtained by the Hauser companies, $11 million was diverted to other firms in the form of questionable commissions, worthless investments, and improper conversions to cash. (D. Ex. 29, pre-trial).

[10] Kleindienst was acquitted of perjury charges in a state criminal proceeding involving this transaction. Hauser was the principal witness for the prosecution. *Arizona v. Kleindienst*, No. CR 118903 (1981).

* * *

"I, I don't know how to express myself to you, Irving. I am right now (in) as bad shape as I've been in the last three years. I am in the worst shape that I've ever been in my entire life." (G. 15-T, p. 2).

* * *

"I, I desperately need either one or two things, either some money, or I need some relief. I'm, here's what, here's the position I'm in. Barbara (his wife) is hitting her head against the wall."

* * *

"We're three months behind in our rent. I owe on my tuition for my kids."

* * *

"Steven (his son) had a serious problem to graduate."

* * *

"My phone I have until Monday to be shut off. I have ah electric bills...." (G. 15-T, p. 3).

By June of 1979, Davidson had succumbed and agreed to arrange a meeting in New Orleans with Marcello. On June 28, Hauser, Davidson and Marcello met and at Hauser's prompting there were discussions regarding the acquisition of insurance contracts for Prudential through payments to local officials as campaign contributions.

In September 1979, the agents and Hauser were introduced by Marcello to various public officials in Louisiana, among them Roemer, who was then both the Commissioner of Administration for the state and the campaign manager and chief fundraiser for a major candidate for

governor in a hotly contested campaign that was then in full swing.[11] Viewing the evidence in the light most favorable to the government, Roemer and Marcello agreed to accept a share of future insurance commissions in return for Roemer's assistance in getting a state insurance contract placed with Prudential. With this agreement, the crime of bribery in violation of state law was complete.

What began as a national investigation into alleged labor union corruption ended in the smoke-filled backrooms of local politicians with outstretched hands in search of contributions to fuel costly campaigns. Rather than treat it as such, the prosecutors sought to sew together the fig leaves of local bribery into a RICO apron of federal crimes.[12] The enterprise alleged in the indictment was that the defendants were associated together in fact. The pattern of racketeering activity alleged was acts of local bribery and the federal offenses charged in counts III through XII. These federal offenses consisted of long distance telephone calls, a mailing and an interstate travel that were all a part of the effort to secure for Prudential a state insurance contract. As a result of the acquittals, what remains is an alleged agreement by Roemer and Marcello to conduct their affairs through an act of bribery, mailing a letter, and making a phone call.[13]

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[11] Altogether, the government contributed $46,000 to candidates in the Louisiana elections. The only government backed candidate to win was Bobby Freeman, now Lieutenant Governor of the State of Louisiana.

[12] "And they sewed fig leaves together, and made themselves aprons." *Genesis* 3:7-8.

[13] We adopt Roemer's position expressed in footnote 13 of his petition that under established principles of conspiracy law, should the Court find a defect with the mailing as argued by Roemer, then the conviction for either Marcello or Roemer cannot stand absent some proof

## REASONS FOR GRANTING THE WRIT

Pursuant to Rule 17, the Court should grant the writ because the trial court's opinion, affirmed by the court of appeals, effectively eliminates the necessity of proving the existence of an enterprise as a separate element of the crime. This conflicts with the language of the statute, its interpretation by this Court in *United States v. Turkette*, 452 U.S. 576, and the decisions of another circuit court of appeals.

*Turkette* held that a RICO enterprise may consist of individuals associated in fact for solely illegitimate purposes. Such was the enterprise alleged in this case. *Turkette*, however, made clear in a RICO conspiracy prosecution that the government must prove the existence of an enterprise as a separate element apart from any conspiratorial combination to commit the predicate offenses. The Court said:

> "In order to secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. §1961(1). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a

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(Footnote 13 continued)
that the jury did not rely on the mailing as the second requisite predicate offense. *Stromberg v. California*, 283 U.S. 359. Of course, there is no proof that the jury did not rely on the mailing as the second predicate offense.

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> continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id.* at 583 (footnote omitted).

The Court noted in passing that much of the evidence in that record focused upon the "professional nature" of the organization there involved.

*Turkette* did not remotely suggest that Congress intended, in adopting RICO, to criminalize an agreement to associate with others to commit multiple offenses and thereby enhance existing penalties for conspiracies to commit these offenses. While it is true that RICO affords an additional remedy to combat group criminality, there is nothing in the statute, its history, or this Court's interpretation of it to suggest that a new species of inchoate offenses was being created. Yet, that is precisely what happened under the lower courts' approach. By effectively eliminating the necessity of proving the separate existence of an enterprise, the lower courts allowed the jury to convict these defendants of a conspiracy to associate with one another. Thus, they were convicted of a conspiracy to conspire, a totally new species of inchoate offenses, one unauthorized by the statute and certainly offensive to the due process aversion to guilt by association.

That this was the result of the proceedings below is

apparent from the trial court's inability to articulate any evidence proving the existence of an enterprise apart from the conspiratorial combination to commit the predicate offenses. In addressing the issue of whether the proof established the separate existence of an enterprise, the trial court wrote:

> "In this case, the government amply proved an agreement to participate in an enterprise separate and apart from the mere commission or agreement to commit acts of racketeering activity. Marcello and Roemer directly discussed the arrangements for obtaining the state employees insurance contract, as well as the political machinations indirectly related to their plan, and other matters on several occasions. They arranged meetings, exchanged ideas, and made plans between themselves, with others, and through intermediaries. The government proved an association in fact between these two individuals, and an agreement to associate together, that fits within the broad definition of 'enterprise' provided by the RICO statute and by the jurisprudence interpreting it." 537 F.Supp. 1386.

Not one factor relied upon by the trial court distinguished this so-called enterprise conspiracy from an ordinary conspiracy to commit multiple offenses. In actuality, the lower court held that what established the enterprise conspiracy here was the fact that Marcello and Roemer met often. The deftness of co-conspirators is not a RICO benchmark. There simply was no evidence in the record of an "ongoing organization" that functioned "as a continuing unit," or that was of a "professional nature". Indeed, Marcello and Roemer were brought together in the case by two fortuitous circumstances over which neither had control: the governmentally created sting operation and the campaign

for governor in Louisiana.

That the lower courts misunderstood the nature of a RICO conspiracy is also evident from the erroneous instructions to the jury. Over objection, the trial court began its instruction on the RICO conspiracy in the following manner:

> "Count One of the indictment alleges that between February 1979 and February 1980, the defendants, Carlos Marcello, I. Irving Davidson, Charles E. Roemer, II, and Vincent A. Marinello, unlawfully, willfully, and knowingly *conspired to associate in fact* as an enterprise engaged in, or the activities of which affected, interstate commerce for the purpose of obtaining insurance contracts through a pattern of racketeering activity in violation of the United States Code." (Emphasis added).

Counsel objected to the notion that RICO criminalized a conspiracy "to associate in fact." This was the beginning of a set of instructions that permitted the jury to find Marcello and Roemer guilty of, in effect, a conspiracy to conspire. The trial court refused to give the following substituted language that properly sets forth the offense:

> **"Count One of the indictment alleges that between February 1979 and February 1980, the defendants, Carlos Marcello, I. Irving Davidson, Charles E. Roemer, II, and Vincent A. Marinello, unlawfully, willfully, and knowingly conspired to violate Section 1962(c) of Title 18 of the United States Code by agreeing to participate in the conduct of the affairs of an enterprise engaged in or the activities of which affect interstate commerce, through the commission of two or more acts of racketeering activity."**

In the very next paragraph, the trial court made another misstatement of the law:

> "A 'conspiracy' is a combination or agreement of two or more persons to join together *to attempt* to accomplish some unlawful purpose. It is a kind of 'partnership in crime' in which each member becomes the agent of every other member. It is a combination or mutual agreement by two or more persons to disobey or disregard the law." (Emphasis added).

A conspiracy is an agreement to violate the law, not an agreement to attempt to violate the law. Over counsel's objection, the trial court would not delete the language. Thus, the very first two paragraphs of the charges erroneously taught the jury that the first aspect of a RICO conspiracy, agreeing to conduct the affairs of an enterprise, could be made out by an agreement between Roemer and Marcello *to associate to attempt* to accomplish the purpose of obtaining insurance contracts. The trial court committed the same error on the following page, over objection, where it again instructed the jury:

> "First: That the conspiracy charged in the indictment was willfully formed by two or more persons who in some manner, whether overtly or tacitly, came to a mutual understanding that they would *attempt to accomplish* an unlawful purpose, as charged in the indictment, and that the conspiracy existed at or about the time alleged." (Emphasis added).

Later during the charge, when the trial court instructed on the elements of the substantive RICO count, the court over objection stated the first element as:

> "In order to establish that any defendant violated the United States Code by committing the acts charged in Count Two of the indictment, the government must prove each of the following essential elements beyond a reasonable doubt:
>
> First: *That the defendant was associated with an enterprise.* The term 'associated with' includes direct and indirect participation in the conduct of the enterprise. The term 'enterprise,' you will remember, includes any group of individuals associated in fact whether or not they have formed a legal entity." (Emphasis added).

Counsel offered the following substituted language that the court refused to give:

> "In order to establish that any defendant violated the United States Code by committing the acts charged in Count Two of the indictment, the government must prove each of the following essential elements beyond a reasonable doubt:
>
> First: The existence of the enterprise;
> Second: That the defendant was associated with the enterprise. The term 'enterprise,' you will remember, includes any group of individuals associated in fact whether or not they have formed a legal entity."

What the trial court did in its instruction was to improperly assume the existence of an enterprise. Moreover, by assuming the existence of the enterprise and by not instructing that an enterprise must have an existence apart from the pattern of racketeering activity, the court permitted the jury to find a RICO conspiracy on evidence either of an agreement to associate or an agreement to commit the predicate offenses; i.e., a conspiracy to conspire.

Neither an agreement to associate nor an agreement to commit predicate offenses is criminalized by RICO. Rather, it is the agreement to conduct the affairs of an enterprise, separately existing, through the commission of at least two predicate offenses that is proscribed by RICO.

Counsel submitted an instruction that would have made this distinction clear. The trial court declined to give the following:

> "In determining whether the government has proven beyond a reasonable doubt the existence of an enterprise, I instruct you that the enterprise must have an existence apart from the pattern of racketeering activity. The existence of an enterprise and the pattern of racketeering activity are separate and distinct elements and must both, as all other elements to an offense, be proven beyond a reasonable doubt. While these two elements may be adduced from the same evidence, the proof of one does not automatically prove the other. Therefore, you must be convinced beyond a reasonable doubt that apart from any alleged pattern of racketeering activity there existed at the time in question a separate, ongoing enterprise that had an existence or identity of its own."

This language was squarely based on *Turkette*.

The instructions of the trial court, approved by the court of appeals, conclusively demonstrate the misconception that RICO proscribes individuals from agreeing to associate together for the purpose of committing predicate offenses. That is simply not true. There must separately be in existence an enterprise. A RICO conspiracy then condemns an agreement to conduct the affairs of that enterprise through the commission of two or more predicate

offenses. Otherwise, every conspiratorial confederacy to commit predicate offenses would be punishable as a RICO violation.

The Eighth Circuit has properly analyzed the problem presented by this case and has correctly set forth the law. Relying upon *Turkette*, the court of appeals in *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982), *cert. denied* __ U.S. __, 103 S.Ct. 456, __ L.Ed.2d __, held that:

> "Construing the statute to give effect to all its words, it requires an association with an enterprise which is distinct from participation in the conduct of the enterprise through a pattern of racketeering activity. In order for such association, for example, formal membership in or employment by a legitimate organization or their equivalent in a criminal group, to exist, the enterprise must be more than an informal group created to perpetrate the acts of racketeering." *Id.* at 663.

The court of appeals explained:

> "Any two criminal acts will necessarily be surrounded by some degree of organization and no two individuals will ever jointly perpetrate a crime without some degree of association apart from the commission of the crime itself. Thus unless the inclusion of the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering, the Act simply punishes the commission of two of the specified crimes within a 10-year period." *Id.* at 664.

The court of appeals in *Bledsoe* then characterized three

factors that are relevant in distinguishing an enterprise conspiracy from the ordinary conspiratorial combination: 1) commonality of purpose; 2) continuity; and 3) an ascertainable structure "distinct from that inherent in the conduct of a pattern of racketeering activity." *Id.* at 665. With respect to the latter, the most important, the court of appeals said:

> "This distinct structure might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes." *Id.* at 665.

See also: *United States v. Lemm*, 680 F.2d 1193 (8th Cir. 1982), *cert. denied* __ U.S. __, 103 S.Ct. 739, __ L.Ed.2d __; and *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied* 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981). The Second Circuit has likewise recognized the necessity of distinguishing an enterprise conspiracy from the common conspiratorial combination. See *United States v. Ivic*, 700 F.2d 51 (2nd Cir. 1983).

Other Circuits, however, including the Fifth, have failed to crystallize this distinction. See *United States v. Cagnina*, 697 F.2d 915 (11th Cir. 1983); *United States v. DeRosa*, 670 F.2d 889 (9th Cir. 1982), *cert. denied* __ U.S. __, 103 S.Ct. 353, 372, __ L.Ed.2d __; *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert denied* 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978); and *United States v. Griffin*, 660 F.2d 996 (4th Cir. 1981), *cert. denied* 454 U.S. 1156, 102 S.Ct. 1029, 71 L.Ed.2d 313 (1982). The conflict among the Circuits over the nature of a RICO conspiracy is more than a difference in approach, but rather involves

a fundamental difference of opinion over the underlying nature of the conduct proscribed by the statute. Granted "...an amoeba-like infra-structure that controls a secret criminal network," *Elliott, supra*, at 898, may serve as the basis of an enterprise. And, as seen in *Elliott*, RICO may be used as a "...legislative innovation in the realm of individual liability for group crime" by providing the government with a tool to prosecute "...highly diverse crimes by apparently unrelated individuals." *Elliott, supra*, at 902-903. That which limits a RICO prosecution, however, as made clear in *Turkette* and the decisions of the Eighth Circuit, is the necessity of proving the existence of an enterprise separate and apart from a conspiratorial confederacy to commit the predicate offenses. In other words, RICO conspirators at a minimum must have the common bond of furthering the larger goals of the enterprise apart from furthering the lesser goal of committing the specific offenses charged as predicate acts.

A leading commentator in the field projected the precise anomaly presented by this case:

> "...the conspiracy provision, section 1962(d) is meaningless if the existence of illegal enterprises is assumed....a RICO conspiracy count will be incomprehensible in illegal enterprise cases because a section 1962(d) count will contain two conflicting concepts that refer to the same group of people. A section 1962(d) count would allege that X and Y agree to associate to commit a pattern of racketeering activity, unlike a traditional conspiracy count, which alleges that X and Y agree to commit a particular crime. The concept of an 'agreement to associate' is an absurd redundancy similar to a 'conspiracy to conspire.' " Tarlow, "RICO Revisited," 17 *Georgia Law Review* 291, 393 (1983).

The Justice Department has itself recognized the dangers of confusing an enterprise with the associational conduct present in any common conspiracy to commit multiple offenses. In its guidelines for prosecutors, the Department has adopted the Eighth Circuit's approach of insisting upon an independent, ascertainable structure for the enterprise apart from the group activity that necessarily premises a conspiracy to commit multiple offenses.[14]

There was no evidence in this case to establish an ascertainable structure of the enterprise apart from the pattern acts. Indeed, there was not even present here a diversity in the pattern acts that *Bledsoe* suggested might demonstrate a distinct structure. As the trial court admitted:

> "I agree with the defendants that the evidence clearly showed that every act charged as a predicate offense against these defendants was related to a single scheme to obtain the state employees insurance contract." 537 F.Supp. at 1385.

All the government proved in this case was that Marcello and Roemer agreed to commit an act of local bribery through mailing a letter and making a telephone call to

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[14] Guideline VI provides:

> "No RICO Count of an indictment shall charge the enterprise as a group associated in fact, unless the association in fact has an ascertainable structure which exist for the purpose of maintaining operations directed toward an economic goal, that has an existence that can be defined apart from the commission of the predicate acts constituting the patterns of racketeering activity." United States Attorney's Manual §9.110.101 (Jan. 30, 1981).

secure an insurance contract.[15] There was no evidence of an enterprise other than the conspiratorial efforts of Roemer and Marcello to commit these offenses. In fact, the jury rejected all other government allegations, and the trial court in its opinion could not point to anything that distinguished this so-called enterprise from a common conspiracy to commit multiple offenses. None existed.

The jury's verdict was the obvious result of the trial court's erroneous instructions. The jury was never told that the enterprise must be proven as an element separate and apart from a conspiracy to commit the predicate offenses. Rather, the jury was told that if Marcello and Roemer agreed to associate together for the purpose of committing the predicate offenses, they could be found guilty of a RICO conspiracy. That is precisely what the jury did and that is precisely what this Court in *Turkette* said was impermissible. One must question the continued usefulness of this Court's published opinions if lower courts, without comment, simply disregard their directives.

## CONCLUSION

**Of all the RICO prosecutions, this is the first where the defendants were convicted of the conspiracy charge and acquitted of the substantive offenses. Given proof of the commission of the pattern of criminal activity, one might infer the agreement to commit the offenses for the purpose of advancing the larger goals of a separately existing enterprise. Without proof of the commission of the offenses, however, it is quite difficult to demonstrate something**

[15] We of course reiterate Roemer's position that the mailing and telephone call were "...the government's invention" and that the conviction cannot stand for that reason. (Roemer's petition, p. 22).

other than an ordinary conspiracy to commit multiple offenses. Nothing more was proven here.

The trial court stated that the case raises "...serious and in some respects significant questions of law, policy and priorities." 537 F.2d at 1386. Unfortunately, the state of the jurisprudence is such that if what occurred in the case had happened in Minneapolis rather than New Orleans, the outcome would have been different as a matter of law. This does not speak well for our federal system and the Court should exercise its supervisory jurisdiction to resolve the matter.

Respectfully submitted:

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By: _____
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## CERTIFICATE OF SERVICE

This is to certify that copies of the Petition for Writ of Certiorari have been served upon the United States of America by placing three copies thereof in the United States Mail, postage prepaid, addressed to The Honorable Rex E. Lee, Solicitor General, Department of Justice, Main Justice Building, Room 5143, Washington, D.C. 20530; and by placing three copies thereof in the United States Mail, postage prepaid, addressed to The Honorable John Volz, United States Attorney for the Eastern District of Louisiana, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130; and by placing three copies thereof in the United States Mail, postage prepaid, to the co-defendant, Charles Roemer II, through his attorney of record, John R. Martzell, 338 Lafayette Street, New Orleans, Louisiana 70130.

New Orleans, Louisiana, this 27th day of July, 1983.

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Attorney for Petitioner

**APPENDIX "E"**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 82-3040

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLOS MARCELLO,

Defendant-Appellant.

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Appeal from the United States District Court for the Eastern District of Louisiana

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ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion 4/11/83, 5 Cir., 1983, __ F.2d __).

(May 31, 1983)

Before GOLBERG, GEE and RANDALL, Circuit Judges.

PER CURIAM:

(✓)Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule

35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge